Supreme Court, U.S.
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No. 09-806

IN THE

Supreme Court of the United States

KENNETH WRIGHT and GARY THOMPSON,

Petitioners,

v.

EASTMAN KODAK COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Contrary to petitioners' characterization of the questions presented, the sole question for this Court's review is whether the district court abused its discretion in denying petitioners' Rule 56(f) request for additional discovery.

STATEMENT PURSUANT TO RULE 29.6

The Eastman Kodak Company has no parent corporation. Legg Mason Capital Management, Inc. is a publicly held corporation that owns 10% or more of Kodak stock.

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PRELIMINARY STATEMENT

Respondent Eastman Kodak Company ("Kodak" or "respondent"), opposes the petition for a writ of certiorari filed by petitioners on October 14, 2009. Petitioners argue that the Court should grant a writ of certiorari here "because the lower courts have failed to follow clearly defined precedent . . . and statutory rules of evidence . . ." (*See* Petition, at 6). Writs of certiorari simply do not issue to correct alleged failures by lower courts to "follow clearly defined precedent . . . and statutory rules of evidence." For the reasons set forth in this brief, the petition, which seeks to overturn the July 16, 2009 order of the United States Court of Appeals for the Second Circuit in favor of the respondent, should be denied in its entirety.

FACTUAL BACKGROUND

In July 2004, petitioners Kenneth Wright and Gary Thompson (collectively "petitioners") brought separate actions against their former employer, Kodak, in the United States District Court for the Western District of New York. Both petitioners alleged that Kodak discriminated against them during their employment on the basis of race and retaliated against them, in purported violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended, 42 U.S.C. § 1981 ("Section 1981"), and the New York State Human Rights Law.

By order dated August 22, 2006, the district court dismissed all of Wright's claims arising before October 26, 1999, and all of Thompson's claims arising before December 3, 1999, on the grounds that each petitioner had released those portions of his claims by executing a valid release in exchange for consideration. A-4 (Dist. Ct. Dkt. No. 26). Thereafter, on September 18, 2007 (more than three years into the case), Kodak filed a motion for

summary judgment seeking the dismissal of both petitioners' remaining claims, with prejudice, as a matter of law and undisputed fact. Kodak based its motion on petitioners' deposition testimony and sworn responses to Kodak's interrogatories, which established that neither petitioner had evidentiary support for any of the claims asserted.

In response to Kodak's summary judgment motion, each petitioner admitted (or indicated that he had no basis for disputing) the vast majority of the material facts set forth in Kodak's Local Rule 56.1 Statement and relied primarily on a request for additional discovery pursuant to Rule 56(f) of the Federal Rules of Civil Procedure. Kodak opposed the Rule 56(f) request for additional discovery on the grounds that it was both insufficient under the standards established by the Second Circuit and untimely.

On April 23, 2008, the district court (Larimer, J.) issued a Decision and Order granting Kodak's motion for summary judgment and dismissing both petitioners' claims in their entirety. *See Wright v. Eastman Kodak Co.*, 550 F. Supp. 2d 371 (W.D.N.Y. 2008); A-174-190; 268-284. The district court based its decision on the fact that, even after granting petitioners the liberal interpretation and favorable inferences due to a non-movant, each still failed to establish a prima facie case of discrimination or retaliation with respect to any of his claims. A-180; A-274. In fact, the court noted that petitioners had "candidly acknowledge[d] that [he had] no admissible evidence to support [his] claims." A-188; A-282.

In its Decision and Order, the district court also denied petitioners' Rule 56(f) request. A-189; A283. The court ruled that petitioners' request was substantively deficient in that it offered only "scant details concerning

the precise discovery sought, or what it may [have been] expected to yield" and failed "to identify the 'evidentiary gaps' that the requested discovery [was] meant to address." *Id.*

In addition, the district court further concluded that petitioners had been dilatory in pursuing the requested discovery. In support of this conclusion, the court noted, *inter alia*, that petitioners had failed to renew a related motion to compel discovery that had been dismissed by the magistrate judge (without prejudice to renewal) more than a year before petitioners made their Rule 56(f) request. *Id.* The court also noted that the deadline for fact discovery, which petitioners admitted was extended multiple times at his request, had already passed before petitioners ever brought any discovery issue back before the court. *Id.*

On appeal to the United States Court of Appeals for the Second Circuit, both petitioners limited their appeal to the district court's denial of their Rule 56(f) motion for further discovery. The Second Circuit consolidated the two separate appeals, which were heard in tandem, for purposes of disposition. In a brief, unpublished summary order, the Second Circuit affirmed the judgment of the District Court. *See Wright v. Eastman Kodak Co.*, 328 Fed. Appx. 738 (2d Cir. July 16, 2009).

After correctly observing that a district court's denial of a Rule 56(f) motion is reviewed for abuse of discretion, the Second Circuit held that the district court here acted within its discretion in denying petitioners' motion. *See* 328 Fed. Appx. at 738-739 (citing *Williams v. R.H. Donnelley Corp.*, 368 F.3d 123, 126 n.1 (2d Cir. 2004). The court stated that "[a]lthough plaintiffs sought discovery early in the pretrial process and initially moved to compel disclosure, after the magistrate judge denied

plaintiffs' motion to compel with leave to renew, plaintiffs did not renew their motion in the more than a year that elapsed before the deadline to do so." *Id.* at 739. Further, the court recognized that "even when Kodak moved for summary judgment twelve days before the deadline for making a motion to compel, [petitioners] did not renew their motion" and failed to "seek an extension of that deadline." *Id.*

Moreover, the court noted that petitioners "were vague both in their description of requested documents and in their explanations of how those documents and/or requested deposition testimony would satisfy their burden of demonstrating a genuine dispute of material fact." *Id.*

Accordingly, the Second Circuit concluded that the "district court's decision was justified by [petitioners'] delay in making an appropriate motion and by the speculative nature of their claim that the requested discovery would enable them to defeat Kodak's summary judgment motion." *Id.*

ARGUMENT

POINT I

PETITIONERS' PROPOSED QUESTIONS PRESENTED FOR REVIEW BY THIS COURT ARE UNPRESERVED

Petitioners argue that this Court should grant this petition for certiorari because "the Second Circuit and district court refused to give any consideration whatsoever" to two determinations of the Equal Employment Opportunity Commission ("EEOC") dated February 6, 2004, which petitioners assert is "admissible evidence" under Federal Rule of Evidence ("FRE") 803(8). (Petition, at 6-7). According to petitioners, had the lower

courts considered the "records," "data compilations," and "factual findings" in the EEOC determinations, their Rule 56(f) motion "would have been granted and/or [Kodak's] Motion for Summary Judgment would have been denied." (*Id.* at 7). Petitioners argue that under FRE 803(8), the EEOC determinations established a prima facie case for granting their Rule 56(f) motion. (*Id.* at 5).

This argument is unpreserved for further appellate review. *See Green Mt. R.R. Corp. v. Vermont*, 404 F.3d 638, 644 (2d Cir. 2005) (generally courts "do not consider an issue raised for the first time on appeal"). Petitioners never raised this FRE 803(8)-based argument at the Second Circuit; in fact, neither petitioner even cited this evidentiary provision in their Second Circuit brief. Accordingly, this Court should not entertain this argument.

POINT II

THE COURTS BELOW DID NOT ERR AS A MATTER OF LAW BY PURPORTEDLY FAILING TO GIVE CONSIDERATION TO THE EEOC DETERMINATIONS

Petitioners' argument is wholly devoid of merit. FRE 803(8) is the public records exception to the hearsay rule; it has nothing to do with whether a Rule 56(f) motion is properly supported. FRE 803(8) simply states:

> Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or

> (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

FRE 803(8).

Thus, the issue of whether the EEOC determinations referenced by petitioners constitute "admissible evidence" under the Federal Rules of Evidence is simply irrelevant to the real issue in this case, i.e., whether the district court abused its discretion in denying petitioners' Rule 56(f) request for additional discovery.

POINT III

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN DENYING PETITIONERS' RULE 56(F) REQUEST FOR ADDITIONAL DISCOVERY

It is well-settled that circuit courts review a district court's denial of a motion for further discovery solely for abuse of discretion. *See Williams v. R.H. Donnelley Corp.*, 368 F.3d 123, 126 n.1 (2d Cir. 2004); *Nat'l Union Fire Ins. Co. of Pittsburgh v. Stroh Cos., Inc.*, 265 F.3d 97, 117 (2d Cir. 2001) ("We review a district court's refusal to allow additional discovery for abuse of discretion."); *Paddington Partners v. Bouchard*, 34 F.3d 1132, 1137 (2d Cir. 1994) ("A district court's denial of more time to conduct discovery pursuant to Rule 56(f) is subject to reversal only if it abused its discretion."). Here, the Second Circuit reviewed the denial of petitioners' Rule 56(f) motion under the proper "abuse of discretion" standard. *See Wright*, 328 Fed. Appx. at 738.

For all the reasons set forth in the Second Circuit and district court opinions, petitioners' Rule 56(f) request for further discovery was properly denied. Petitioners did not adequately describe the nature of the facts they sought to obtain through further discovery, nor did they sufficiently explain how those facts were reasonably expected to create a genuine issue of material fact sufficient to defeat summary judgment.

As the Second Circuit concluded, petitioners "were vague both in their description of requested documents and in their explanations of how those documents and/or requested deposition testimony would satisfy their burden of demonstrating a genuine dispute of material fact." 328 Fed. Appx. at 739. The Second Circuit properly evaluated petitioners' motion under well-established standards and found petitioners' motion substantively deficient. *See Paddington Partners v. Bouchard*, 34 F.3d 1132, 1138 (2d Cir. 1994) (an affidavit submitted pursuant to Rule 56(f) "must include the nature of the uncompleted discovery; how the facts sought are reasonably expected to create a genuine issue of material fact; what efforts the affiant has made to obtain those facts; and why those efforts were unsuccessful"). Other than arguing that it was an abuse of discretion not to consider the EEOC's determinations in ruling on their Rule 56(f) motion, which, as discussed above, is unpreserved and meritless, petitioners fail to articulate any other ground for finding an abuse of discretion.

Finally, petitioners do not even attempt to explain why their questions presented are significant enough to warrant Supreme Court attention. Indeed, petitioners' stated rationale for issuance of a writ of certiorari demonstrates that the writ should not issue:

> This Court should allow this writ for certiorari review simply because the lower courts have failed to follow clearly defined precedent (i.e. holding that the findings of administrative agencies amount to admissible evidence) and statutory rules of evidence (i.e. F.R.E. 803(8).

(*See* Petition, at 6).

The issues petitioners raise are simply "run-of-the-mill," commonplace discovery challenges. No conflict with Supreme Court precedent has been identified nor is there a "circuit split" on the proper standard of review for a district court's denial of a motion for further discovery under Rule 56(f).

CONCLUSION

For all of the foregoing reasons, the petition for certiorari should be denied in its entirety.

Dated: February 5, 2010

Respectfully submitted,

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